

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Effects of Communications Towers on	)	WT Docket No. 03-187
Migratory Birds	)	
_____	)	

**Comments of Sprint Nextel**

Sprint Nextel Corporation (“Sprint Nextel”) submits these comments in response to the Notice of Proposed Rulemaking (“Notice”) the Federal Communications Commission (“Commission”) released November 7, 2006, seeking comment on whether it should enact or revise rules with the aim of reducing migratory bird collisions with communications towers.<sup>1</sup>

While Sprint Nextel applauds the goal of the Commission’s proceeding, it notes that absent a sufficient demonstration of causation between communications towers and avian populations, the Commission must proceed with extreme caution before placing additional and potentially unnecessary obligations and costs on companies whose “[c]ommunications towers are essential to modern American life.”<sup>2</sup> At the outset, we note that little has changed in the way of documented scientific evidence since the

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<sup>1</sup> Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, *Notice of Proposed Rulemaking*, FCC 06-164 (rel. Nov. 7, 2006) (“Notice”) at ¶ 1.

<sup>2</sup> *Notice* Statement of Michael J. Copps. *See also* *Notice* Statement of Jonathan S. Adelstein (“At the same time, communication towers represent a critical component in the continued deployment of basic and advanced telecommunications services throughout the country. . . . [T]hey are also used everyday by our nation’s public safety community to effectively and timely respond to those who need our help the most.”); *Notice* Statement of Robert M. McDowell (Commission must “balance the need to protect against avian mortalities associated with communications towers, while not unduly hampering the ability of industry to deliver new, advanced services to American consumers as quickly and economically as possible.”).

Commission initiated its Notice of Inquiry in this proceeding. Then, as now, it remains true that without development of core facts in this area, the Commission cannot proceed with new regulations or even determine *whether* new rules in this area would achieve the objective of protecting migratory birds.<sup>3</sup>

**I. The Source of Commission Authority in this Area is Limited by NEPA and the ESA, Neither of Which Has Been Satisfied.**

Commission authority over environmental matters is limited to those circumstances specified in the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”). NEPA commands that federal agencies adopt regulations for major federal actions that “significantly affect[]” the quality of the human environment.<sup>4</sup> The ESA, which focuses on the well-being of endangered species, commands that any action by a federal agency not jeopardize the “continued existence” of any endangered or threatened species.<sup>5</sup> Neither of these statutes confers a broad grant of Commission authority to regulate in this area without a basis for demonstrating that communications towers meet the stated thresholds. The Notice itself tentatively concludes that the Commission may determine that it must promulgate regulations specifically aimed at protecting migratory birds “provided that there is *probative evidence* that communications towers are adversely affecting migratory birds.”<sup>6</sup>

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<sup>3</sup> See Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, Sprint Comments dated November 12, 2003. Since that time, with the exception of reports that primarily compiled data from past anecdotal accounts of bird kills around communications towers, only one study, that by Dr. Joelle Gehring, has emerged with some potentially scientific evidence. See Notice at n.99. However, even that study was quite limited in scope (30 towers in Michigan), and, more significantly for wireless telecommunications carriers, did not study the effects of any towers shorter than 380 feet above ground level (AGL).

<sup>4</sup> See 42 U.S.C. § 4332(2)(c).

<sup>5</sup> See 16 U.S.C. § 1536(a)(2).

<sup>6</sup> Notice at ¶ 33.

As a threshold matter, in the absence of significant scientific studies, Commission action is neither warranted nor obligated under NEPA or the ESA. As confirmed by the Commission's own consultant, Avatar, "[t]here are no studies to date that demonstrate an unambiguous relationship between avian collisions with communications towers and population decline of migratory bird species."<sup>7</sup> Indeed, there have been no studies to suggest what level of bird mortality would rise to the level of "significantly affecting the quality of human environment"<sup>8</sup> or "jeopardiz[ing] the continued existence"<sup>9</sup> of the migratory birds listed on the endangered species list.

The Notice sought comment on the relevance of other causes of avian mortality, including buildings, power transmission lines, and motor vehicles.<sup>10</sup> Other causes of avian mortality are not only relevant to any proposed Commission action in this area, but actually are required to be taken into account under NEPA:

*Significantly* as used in NEPA requires considerations of both context and intensity:

- (a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality....

*See* 40 C.F.R. § 1508.27(a).

Using estimates from the Fish and Wildlife Service from the effects of other sources of avian mortality, it can hardly be said that the number of bird deaths attributable to communications towers are anything but miniscule. According to various

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<sup>7</sup> Notice at ¶ 23.

<sup>8</sup> 42 U.S.C. § 4332 (NEPA).

<sup>9</sup> 16 U.S.C. §1536(a)(2) (ESA).

<sup>10</sup> Notice at ¶ 34.

sources, the following other causes of avian mortality are much more significant than the minute amount of deaths that may be caused by communications towers:

Building windows: 97-980 million birds per year;<sup>11</sup>  
Vehicles: 60-80 million birds per year;<sup>12</sup>  
Power-lines: anywhere from thousands to 175 million birds per year;<sup>13</sup>  
Cats: hundreds of millions of birds per year;<sup>14</sup>

Taking the Fish and Wildlife Service's unscientific estimate of 4-5 million to "perhaps as high as 40-50 million" birds killed yearly due to communications towers, to single out communications towers for regulation is not supportable in light of the estimates of deaths attributable to these other factors.

## **II. Given the Importance of Wireless Communications to the Nation, the Commission Must be Cautious of Imposing New Regulations Regarding Tower Siting.**

The Telecommunications Act of 1996 contains obligations to *promote* deployment of broadband wireless infrastructure.<sup>15</sup> Furthermore, Congress has expressed concern about "dead zones" where wireless calls "cannot be transmitted due to the

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<sup>11</sup> Comments of the U.S. Fish and Wildlife Service at 13 ("Fish and Wildlife Comments") (filed February 2, 2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Domestic Cat Predation on Birds and Other Wildlife, available at <<http://www.abcbirds.org/cats/factsheets/predation.pdf>> at 1. To further put the relatively small danger that communications towers may cause into context, the same document cites studies that suggest that the *rural* free-roaming cats of Wisconsin alone—to say nothing of Wisconsin's urban and suburban housecats—may kill as many as 217 million birds per year. *Id.* at 2.

<sup>15</sup> *See, e.g.*, Telecommunications Act of 1996, Pub. L. 104-104, § 706, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans..."); Wireless Communications and Public Safety Act of 1999 at § 2(b) ("The purpose of this Act is to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs.").

absence of a nearby cellular or [PCS] antenna.”<sup>16</sup> As dictated by these statutes, absent a compelling and demonstrated need to the contrary, the Commission ought to be encouraging rapid deployment of wireless facilities, rather than erecting more barriers to providing better wireless coverage for the Nation.

The Commission must also proceed very cautiously in this area because of competing interests. The Fish and Wildlife Service comments note that from an avian morality perspective more, shorter towers are preferable to fewer, taller towers.<sup>17</sup> This statement was provided without any documented support and whether it can be backed up by any scientific evidence remains to be seen. Nonetheless, an argument could be made that such a general preference towards more towers would actually undermine other environmental goals as stated in Rule 1.1307(a). Is a policy preferring more potentially shorter towers preferable from the standpoint of impact on historically or architecturally significant areas?<sup>18</sup> Are more sites preferable than fewer sites from the perspective of facilities that may affect Indian religious sites?<sup>19</sup> Are more sites preferable than fewer sites from the perspective of non-avian endangered species?<sup>20</sup> The Commission must look at competing policies before embarking on a path that could lead to more, shorter towers, rather than fewer, taller towers, especially in the absence of any significant scientific basis for such a decision.

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<sup>16</sup> H.R. Rep. No. 1-6-25, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 4-5 (1999).

<sup>17</sup> See U.S. Fish and Wildlife Comments at 23.

<sup>18</sup> See 47 C.F.R. § 1.1307(a)(4).

<sup>19</sup> See 47 C.F.R. § 1.1307(a)(5).

<sup>20</sup> See 47 C.F.R. § 1.1307(a)(3)(i).

If the Commission determines that it must regulate in this area, any regulation must be prospective only, not requiring entities to revisit antenna structures at any interval to retrofit existing lighting, or even more radically, to reduce tower height or even eliminate towers. The Notice implies that the Commission could seek to regulate new towers, but also towers that have been “modified” or “altered.”<sup>21</sup> These terms are not defined in the Notice, but Sprint Nextel submits that, at most, any regulation in this area should be forward-looking only and not require any type of retrofitting. The costs of retrofitting a tower are certainly greater than the cost of applying different specifications to new towers. Due to the cost and effort required and in light of the paucity of rigorous scientific studies reflecting direct linkages between wireless towers and significant avian deaths, this regulation at most should be limited to newly constructed towers.

**III. Rules in Certain Areas are not Necessary Even if There was a Sufficient Showing that Communications Towers Significantly Contribute to Avian Mortality Given Business Imperatives that Demand Operational Costs be Kept to a Minimum.**

Sprint Nextel, and other wireless carriers, operate their businesses as efficiently as they are able. In the area of collocation, the Commission seeks comment on what regulations it might enact to “promote collocation.”<sup>22</sup> It is unnecessary for the Commission to adopt regulations in this area. Licensees have every incentive to collocate wherever possible already. It is generally far less expensive and time consuming to mount equipment on an existing tower and lease space on that tower than construct a

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<sup>21</sup> See Notice at ¶ 38 (“We tentatively conclude that for any newly constructed or modified communications tower that must meet lighting specifications under Part 17 of the Commission’s rules, medium intensity white strobe lights for nighttime conspicuity is to be considered the preferred system...”); Notice at ¶ 41 (“For instance, should we revise Section 17.23 of our rules to establish that, unless otherwise specified by the Commission, each new or altered registered antenna structure must use medium intensity white strobe lights...”).

<sup>22</sup> See Notice at ¶ 60.

wholly new tower. The goal of minimizing operational and capital expenditures in a competitive industry already leads to collocation “to the extent possible.”<sup>23</sup>

This same reasoning holds true in the area of tower height, as well. Taller towers cost more money than shorter towers. As a general matter, Sprint Nextel and its competitors do not today build towers taller than necessary to serve a given area. In fact, one reason why a carrier or tower erector might build a tower taller than its own needs dictate would be for the purpose of allowing collocations from other licensees (and, thereby, minimizing the need for additional towers).

The tower erectors and the service providers are in the best position, from a technical, engineering, and business perspective, to make the most efficient and cost-effective decisions with regard to tower siting and parameters.

#### **IV. Conclusion**

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission refrain from developing new regulations unless and until compelling evidence demonstrates that communications towers pose a significant threat to migratory birds.

Respectfully submitted,

/s/ Laura H. Carter

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<sup>23</sup> *See id.*